

**EMPLOYMENT APPEALS BOARD DECISION**  
**2019-EAB-0171**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On November 28, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 120630). Claimant filed a timely request for hearing. On January 31, 2019, ALJ Meerdink conducted a hearing, and on February 5, 2019 issued Order No. 19-UI-123974, concluding claimant's discharge was not for misconduct. On February 15, 2019, the employer filed an application for review with the Employment Appeals Board (EAB).

In its written argument, the employer disagreed with the ALJ's order, arguing that the ALJ erred by failing to recognize "Preclusive Effect of Agency Order." The employer argued that since a different ALJ in a different proceeding for a different agency found as fact on July 17, 2018 that claimant engaged in abuse because she hit her mother's elderly neighbor on the head, the ALJ in this case was precluded from reaching any different decision. However, the employer did not cite to any particular statute, case, rule, or source of common law to support its argument.

As a preliminary matter, Oregon law does not appear to require that preclusion apply in this case. ORS 43.130 relates to the preclusive effect of judicial orders before a court or judge; the matter decided on July 17, 2018 was an administrative proceeding with an administrative law judge and did not involve a court or judge. ORS 43.140 relates to judicial orders. The July 17<sup>th</sup> order was an administrative order, not a judicial order. ORS 43.160 could have preclusive effect in an administrative proceeding, but only for that which has been determined on the face of the previous order. For the reasons we will explain, while the July 17, 2018 order did determine that claimant hit the elderly neighbor and committed

“abuse,” the order lacked substantial reason and did not on its face suggest that claimant should be disqualified from receiving unemployment insurance benefits because she had done so.

The question is whether we are precluded from reaching a conclusion in this case contrary to that reached by the ALJ in the July 17<sup>th</sup> DHS order. *Nelson v Emerald People's Utility District*, 318 Or. 99, 104, 862 P.2d 1293 (1993) sets forth five requirements before we could consider the DHS order to have preclusive effect here, either of two of which are determinative here: (1) the issue in the two proceedings must be identical, and (5) the prior proceeding must have been the type of proceeding to which courts give preclusive effect.

Regarding the first requirement, the issue in the DHS proceeding was not identical to these proceedings. Although both proceedings involved administrative contested case hearings, and one question in both proceedings was whether claimant hit her mother's elderly neighbor, the actual issue before the ALJ who decided the DHS case in July 2018 was whether DHS could terminate claimant's enrollment as a provider because she engaged in "abuse," which includes "hitting" under OAR 411-020-0002(1)(a)(B)(i) and 411-031-0050(3)(d). The issue in these proceedings is, notwithstanding whether DHS concluded claimant hit her mother's elderly neighbor and committed abuse, the application of ORS 657.176(2) and OAR 471-030-0038 to determine whether DHS's termination of claimant's enrollment was due to her "willful or wantonly negligent failure to maintain" her enrollment, which is misconduct if "reasonably attributable to the individual."<sup>1</sup>

Regarding the fifth requirement, the record is scarce about what type of proceeding was held at DHS, without which we cannot determine that the proceedings were the type that should be given preclusive effect. The exhibits suggest the proceedings involved a contested case hearing, at which claimant was represented by an attorney, and several people testified on behalf of claimant and DHS, which was subsequently reviewed by DHS and upheld. The record is otherwise lacking information suggesting that the type of administrative hearing held on July 17<sup>th</sup> is the type of proceeding that should be given preclusive effect.<sup>2</sup> The employer has the burden to place into evidence not just the judgment, but also sufficient portions of the record, including the pleadings, exhibits, and reporter's transcript of the testimony and proceedings, to enable the court to reach a conclusion about preclusion with a reasonable degree of certainty. *See Barackman v. Anderson*, 214 Or. App. 660, 666, 167 P.3d 994 (2007), *rev. den.* 344 Or. 401, 182 P.3d 200 (2008), *citing State Farm v. Century Home*, 275 Or. 97, 104-05, 550 P.2d 1185 (1976). Here, however, the employer did not present evidence at the hearing about the type of proceeding that led to the July 17<sup>th</sup> judgment, nor did the employer's argument specify why the administrative proceeding at issue is the type of proceeding that should be given preclusive effect.

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<sup>1</sup> “Abuse” as defined in DHS rules at OAR 411-020-0002(1)(a)(B)(i) includes physical abuse and hitting, but does not require that the actor have any particular mental state at the time of the incident, suggesting that accidentally, inadvertently, recklessly, and intentionally hitting an individual could all be considered “abuse” under the rule. Without a mental state associated with the act of hitting or abuse, a finding that claimant engaged in either of those activities does not conclusively establish that her loss of enrollment was due to a willful or wantonly negligent failure to maintain the enrollment that is reasonably attributable to her.

<sup>2</sup> Not all administrative hearings before an ALJ employed by the Office of Administrative Hearings is entitled to preclusive effect. For example, decisions, findings, conclusions, final orders and judgments arising out of unemployment insurance hearings may not be used for the purpose of issue or claim preclusion in proceedings under other chapters of the Oregon Revised Statutes, and are not admissible as evidence in most other civil actions and proceedings. *See* ORS 657.273.

Likewise, the record fails to show that the ALJ's July 17<sup>th</sup> order should, on its face, be entitled to preclusive effect. The DHS order recites and summarizes the testimony adduced at the DHS hearing, but does not explain why the testimony led the ALJ to reach the ultimate conclusion that it was "more likely" that claimant hit the woman than "any alternative scenario." See Exhibit 1. The ALJ's order also omits facts adduced in the unemployment insurance hearing at issue here, such as the fact that police investigated claimant's conduct during the alleged hitting incident and did not charge or cite claimant for her actions in that incident. Without a rational basis establishing why the ALJ weighed the evidence as he did, and without addressing evidence that suggests claimant did not act as alleged and explaining why that evidence was disregarded, the ALJ's order lacks substantial reason, which does not suggest that the order or proceedings that resulted in the order should be given preclusive effect.<sup>3</sup>

Finally, the ultimate outcome of this unemployment insurance case does not rest on whether or not claimant hit her mother's elderly neighbor, or even upon whether DHS found her to have committed abuse and canceled her enrollment. The question before us on review is whether claimant's conduct was misconduct under ORS 657.176 and OAR 471-030-0038. Regardless of whether or not claimant hit the neighbor, neither the record as it was developed at the unemployment insurance hearing nor the ALJ's order in the DHS case establishes willfulness or wanton negligence on claimant's part. The DHS order lacks any mention about claimant's mental state at the time of the alleged incident, and suggests neither an intent to act nor consciousness of conduct on claimant's part. The unemployment insurance hearing likewise does not suggest willfulness or wanton negligence. Absent a basis for finding that claimant's conduct toward her mother's elderly neighbor was reasonably attributable to her as willful or wantonly negligent conduct – regardless whether or not it involved hitting or a DHS finding of abuse – she may not be disqualified from receiving unemployment insurance benefits.

EAB reviewed the entire hearing record. On *de novo* review and pursuant to ORS 657.275(2), the Order under review is **adopted**.

**DECISION:** Order No. 19-UI-123974 is affirmed.

J. S. Cromwell and D. P. Hettle;  
S. Alba, not participating.

**DATE of Service:** March 18, 2019

**NOTE:** You may appeal this decision by filing a Petition for Judicial Review with the Oregon Court of Appeals within 30 days of the date of service listed above. See ORS 657.282. For forms and information, you may write to the Oregon Court of Appeals, Records Section, 1163 State Street, Salem, Oregon 97310 or visit the Court of Appeals website at [courts.oregon.gov](http://courts.oregon.gov). Once on the website, use the 'search' function to search for 'petition for judicial review employment appeals board'. A link to the forms and information will be among the search results.

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<sup>3</sup> Conclusions are supported by substantial reason when they reasonably follow from facts found; a decision that fails to consider all the evidence or adequately explain its findings lacks substantial reason. See *accord Kay v. Employment Department*, 284 Or. App. 167, 391 P.3d 969 (2017) (citations omitted).

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# Understanding Your Employment Appeals Board Decision

## English

Attention – This decision affects your unemployment benefits. If you do not understand this decision, contact the Employment Appeals Board immediately. If you do not agree with this decision, you may file a Petition for Judicial Review with the Oregon Court of Appeals following the instructions written at the end of the decision.

## Simplified Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

## Traditional Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

## Tagalog

Paalala – Nakakaapekto ang desisyong ito sa iyong mga benepisyo sa pagkawala ng trabaho. Kung hindi mo naiintindihan ang desisyong ito, makipag-ugnayan kaagad sa Lupon ng mga Apela sa Trabaho (Employment Appeals Board). Kung hindi ka sumasang-ayon sa desisyong ito, maaari kang maghain ng isang Petisyon sa Pagsusuri ng Hukuman (Petition for Judicial Review) sa Hukuman sa Paghahabol (Court of Appeals) ng Oregon na sinusunod ang mga tagubilin na nakasulat sa dulo ng desisyon.

## Vietnamese

Chú ý - Quyết định này ảnh hưởng đến trợ cấp thất nghiệp của quý vị. Nếu quý vị không hiểu quyết định này, hãy liên lạc với Ban Kháng Cáo Việc Làm ngay lập tức. Nếu quý vị không đồng ý với quyết định này, quý vị có thể nộp Đơn Xin Tái Xét Tư Pháp với Tòa Kháng Cáo Oregon theo các hướng dẫn được viết ra ở cuối quyết định này.

## Spanish

Atención – Esta decisión afecta sus beneficios de desempleo. Si no entiende esta decisión, comuníquese inmediatamente con la Junta de Apelaciones de Asuntos Laborales. Si no está de acuerdo con esta decisión, puede presentar una Petición de Revisión Judicial ante el Tribunal de Apelaciones de Oregon siguiendo las instrucciones escritas al final de la decisión.

## Russian

Внимание – Данное решение влияет на ваше пособие по безработице. Если решение Вам непонятно – немедленно обратитесь в Апелляционный Комитет по Трудоустройству. Если Вы не согласны с принятым решением, вы можете подать Ходатайство о Пересмотре Судебного Решения в Апелляционный Суд штата Орегон, следуя инструкциям, описанным в конце решения.

**Khmer**

ចំណុចសំខាន់ – សេចក្តីសម្រេចនេះមានផលប៉ះពាល់ដល់អត្ថប្រយោជន៍គ្មានការងារធ្វើរបស់លោកអ្នក។ ប្រសិនបើលោកអ្នកមិនយល់អំពីសេចក្តីសម្រេចនេះ សូមទាក់ទងគណៈកម្មការឧទ្ធរណ៍ការងារភ្លាមៗ។ ប្រសិនបើលោកអ្នកមិនយល់ស្របចំពោះសេចក្តីសម្រេចនេះទេ លោកអ្នកអាចដាក់ពាក្យប្តឹងសុំឲ្យមានការពិនិត្យរឿងក្តីឡើងវិញជាមួយតុលាការឧទ្ធរណ៍រដ្ឋ Oregon ដោយអនុវត្តតាមសេចក្តីណែនាំដែលសរសេរនៅខាងចុងបញ្ចប់នៃសេចក្តីសម្រេចនេះ។

**Laotian**

ເອົາໃຈໃສ່ – ຄຳຕັດສິນນີ້ມີຜົນກະທົບຕໍ່ກັບເງິນຊ່ວຍເຫຼືອການຫວ່າງງານຂອງທ່ານ. ຖ້າທ່ານບໍ່ເຂົ້າໃຈຄຳຕັດສິນນີ້, ກະລຸນາຕິດຕໍ່ຫາຄະນະກຳມະການອຸທອນການຈ້າງງານໃນທັນທີ. ຖ້າທ່ານບໍ່ເຫັນດີນຳຄຳຕັດສິນນີ້, ທ່ານສາມາດຍື່ນຄຳຮ້ອງຂໍການທົບທວນຄຳຕັດສິນນຳສານອຸທອນລັດ Oregon ໄດ້ ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄຳຕັດສິນນີ້.

**Arabic**

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**Farsi**

توجه - این حکم بر مزایای بیکاری شما تاثیر می گذارد. اگر با این تصمیم موافق نیستید، بلافاصله با هیأت فرجام خواهی استخدام تماس بگیرید. اگر از این حکم رضایت ندارید، می‌توانید با استفاده از دستور العمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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